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NO. 86-419

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1986

ERNEST S. PATTON, RONALD J. MARKS,
J. HARVEY BELL and WILLIAM HARRISON,
Petitioners

v.

GREGORY S. SOURBEER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE

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The respondent, Gregory S. Sourbeer, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Third Circuit's decision in this case. That opinion is reported at 791 F.2d 1095 (3d Cir. 1986).

STATEMENT OF THE CASE

1. On October 13, 1976, respondent, Gregory Sourbeer, was transferred from a county jail to a state prison following his conviction for homicide. Sourbeer was unsentenced at the time of the transfer. (Pet. p. 95a). Upon arriving at the state prison, Sourbeer was placed in an isolation cell in administrative segregation. Sourbeer remained in isolation for the following twelve months. On October 27, 1977, Sourbeer was returned to the trial court for sentencing. Following sentencing, Sourbeer was returned to the state prison and subsequently placed in the general prison population. (Pet. p. 97a).

During his twelve months of segregative confinement, Sourbeer was housed in the maximum security unit, a separate

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1. On October 13, 1976, respondent, Gregory Sourbeer, was transferred from a county jail to a state prison following his conviction for homicide. Sourbeer was unsentenced at the time of the transfer. (Pet. p. 95a). Upon arriving at the state prison, Sourbeer was placed in an isolation cell in administrative segregation. Sourbeer remained in isolation for the following twelve months. On October 27, 1977, Sourbeer was returned to the trial court for sentencing. Following sentencing, Sourbeer was returned to the state prison and subsequently placed in the general prison population. (Pet. p. 97a).

During his twelve months of segregative confinement, Sourbeer was housed in the maximum security unit, a separate

wing of the state prison that houses prisoners who have violated prison rules or who are for other reasons segregated from the general population. (Pet. p. 98a). As with prisoners who were being disciplined, Sourbeer was locked in his cell twenty-three hours a day, Monday through Friday. On weekends and holidays, confinement was continuous with no opportunity for out-of-cell exercise. Because of his status as a segregated prisoner, Sourbeer was denied visiting privileges accorded prisoners in general population. He was not allowed to participate in educational and vocational training programs, attend religious services in the prison chapel, use the prison library or otherwise participate in the many educational, training, and recreational opportunities open to non-segregated prisoners. (Pet. pp. 98a-99a). During his confinement in segregation, Sourbeer was never examined, tested or evaluated by a psychologist or psychiatrist, although state law required such for prisoners confined continuously for a period of one year. (Pet. pp. 15a, 108a). Sourbeer was never charged with a violation of prison rules during his months in segregation. (Pet. pp. 15a, 118a).

2. On July 14, 1979, Sourbeer commenced a civil rights action alleging inter alia[1] that petitioners had acted unreasonably in conducting the periodic reviews that occurred during the twelve-month period he was unsentenced. Prior to trial, petitioners conceded that Sourbeer had a

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[1] In his Complaint, Sourbeer also claimed petitioners had failed to hold a timely hearing after his placement in segregation and to supply him with the reasons for his confinement. Sourbeer further claimed that petitioners had denied him his First Amendment right to practice his religion by not permitting him to attend religious services in the prison chapel.

"protectable liberty interest in being in the general prison population ..." during the period of his isolative confinement. (App. 2a). The parties stipulated that during Sourbeer's confinement, Pennsylvania regulations required prison officials to review every thirty days a prisoner confined in segregation and to release inmates in segregation "as soon as appropriate" (Pet. pp. 105a, 108a). The parties also stipulated that during the twelve months of Sourbeer's confinement in segregation, three unsentenced inmates had been transferred from segregation and placed in the prison population. (Pet. p. 118a).

In two pre-trial opinions, the district court considered the petitioners' claim that they were entitled to qualified immunity (App. 1a-9a, Pet. pp. 140a-152a). In the initial decision, the court, relying on pre-1977 decisions of the Third Circuit, held that in 1977 reasonable officials should have known that prolonged confinement in isolative segregation "trigger[ed] due process protections." (App. 8a). In its second opinion, the court held that "the clear import" of pre-1977 cases of the Third Circuit was that "prison authorities may not act arbitrarily in transferring a prisoner from general prison population to segregation" and that the requirement of reasonable action was "clearly established at the time of plaintiff's transfer." (Pet. p. 148a). Although the parties had requested the court to decide the case on the basis of their cross-motions for summary judgment, the court, noting the "cryptic and often contradictory decisions" of officials who concluded the periodic reviews, concluded that it needed to hear evidence concerning the reasons for Sourbeer's prolonged isolation "introduced through witnesses subject to cross-examination." (Pet. pp. 151a-152a).

3. Following a non-jury trial, the court found that prison officials had acted unreasonably in the conduct of the periodic reviews during the period between April 13, 1977 and October 12, 1977.[2] In reviewing the testimony of the prison officials, the court held that "over time reasons which would have justified Sourbeer's early detention in administrative custody were applied in a rote fashion in later reviews when experience should have led officials to let Sourbeer into general population." (Pet. pp. 135a-136a).

The court ordered that Sourbeer be compensated in the amount of $10.00 a day for a 197-day period. (Pet. p. 138a).

4. On cross-appeals, the Third Circuit affirmed the district court's finding that Sourbeer had been denied due process in the reviews occurring from April through October 1977.[3] Sourbeer v. Robinson, 791 F.2d 1094 (3d Cir. 1986); Pet. pp. 11a-90a. The court found adequate support in the record for the district court's conclusion that the monthly reviews from April 1977 onward were "perfunctory, thus denying Sourbeer the most fundamental right of due process: a meaningful opportunity to be heard." 791 F.2d 1101, Pet. p. 38a. The court also affirmed the district

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[2]The district court also held that petitioners' initial review of Sourbeer's segregation was conducted in a timely manner, that Sourbeer did not have a liberty interest in population status during the months of January to April 1977 and that petitioners did not violate Sourbeer's First Amendment right by not permitting him to attend religious services in the prison chapel.

[3]The Third Circuit reversed the district court's finding that Sourbeer did not have a protected liberty interest between January through April 1977. 791 F.2d at 1100-1101, Pet. pp. 30-40a. It affirmed, however, the district court's award of damages and its finding that Sourbeer's First Amendment right to practice his religion had not been abridged. 791 F.2d at 1102, 1105, Pet. pp. 41a, 58a.

court's finding that prison officials were not entitled to qualified immunity as Sourbeer's due process rights were "clearly established within the meaning of Harlow" in that pre-1977 decisions of the Third Circuit had put prison officials on notice of "Sourbeer's liberty interest and his concomitant right to due process." 791 F.2d at 1104, Pet. pp. 50a-51a.

REASONS WHY PETITION SHOULD BE DENIED

Introduction

This is an unremarkable case involving well-established legal principles which resulted in a prisoner receiving a modest damage award for many months of unnecessary isolative confinement. In an effort to attract this Court's attention, petitioners claim the Third Circuit's allegedly "broad view of what constitutes 'clearly established right'" in determining qualified immunity raises "important questions of federal law" (Pet. pp. 17, 19). Petitioners also claim that the circuits are in conflict in applying Harlow v. Fitzgerald, 457 U.S. 800 (1982) (Pet. pp. 17, 18). Neither claim merits review by this Court. The record below conclusively establishes that petitioners violated constitutional rights "clearly established" by decisions of this Court and the Third Circuit. Likewise, petitioners' claim of conflict among the circuits finds no support in the numerous qualified immunity decisions of the courts of appeals since Harlow.

I. THE RECORD DOES NOT SUPPORT PETITIONERS' CLAIM THAT THE COURT BELOW APPLIED AN IMPROPER QUALIFIED IMMUNITY STANDARD.

A. Petitioners' Unreasonable Conduct Formed the Basis for the Trial Court's Award of Damages.

To support their claim that the court below applied an improper qualified immunity standard, petitioners state that the liability-creating conduct upon which damages were

awarded was their failure to provide Sourbeer with "periodic reviews from April to October 1977 ...." [Pet. p. 22]. Petitioners flatly misstate the wrongful conduct upon which damages were awarded. It is clear from the record that while petitioners conducted periodic reviews, damages were awarded because Sourbeer's isolation was continued from month to month when no reasons existed to justify such confinement. (Pet. pp. 134a-136a).

As noted above, Sourbeer's complaint alleged that prison officials had acted unreasonably in continuing to confine him in isolation when there were no longer valid reasons for such isolative confinement. Following extensive stipulations concerning the nature of Sourbeer's confinement, the fact that he was free of misconducts during the entire twelve months of segregation, the absence of psychiatric or psychological reasons supporting continued isolation and the fact that other unsentenced prisoners were in general population during the time of his segregation, the parties had requested the trial court to decide the case on their cross-motions for summary judgment. (Pet. pp. 149a-150a). The court identified as a central issue in the case the periodic reviews that were conducted by petitioners and, noting the "cryptic and often contradictory" (Pet. p. 151a) written decisions that followed the periodic reviews, the court concluded that a trial was necessary to permit a "fuller factual development of the reasons for plaintiff's continued administrative confinement." (App. 8a).

In its decision following the trial, the court reviewed the testimony of petitioners with respect to their reasons for continuing Sourbeer in isolation. The court concluded that while there was a need to initially hold respondent in isolation because petitioners had no information about him,

(Pet. p. 130a), petitioners had failed to demonstrate any legitimate reason for his prolonged confinement. (Pet. pp. 134a-136a). The court noted that Sourbeer had never violated prison rules during his twelve months in isolation and that while petitioners had alluded in their reviews to Sourbeer's "programmatic needs" being met by continued confinement, the court noted that there had never been a psychiatric or psychological evaluation of respondent. (Pet. p. 134a). Simply stated, the trial court could find nothing in the evidence offered by petitioners that demonstrated security or other legitimate institutional goals were advanced in any measure by respondent's prolonged confinement. In the absence of such evidence, the trial court found that while Sourbeer's confinement had in fact been reviewed periodically, the reviews from April 1977 to his release in October 1977 were conducted in "rote fashion," as petitioners continued to mechanically apply reasons that initially justified Sourbeer's early segregation. (Pet. p. 136a).

The Third Circuit affirmed the lower court's decision that respondent had been denied due process. The court reviewed the evidence relied upon by the trial court and concluded that there was adequate support in the record that while prison officials had in fact conducted periodic reviews, the reviews from April to October 1977 were "perfunctory" in nature, 791 F.2d at 1101, Pet. p. 381. Citing this court's decision in Parratt v. Taylor, 451 U.S. 527, 540 (1981),[4] the court held that that Sourbeer had been

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[4]Citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965), this court in Parratt stated that "the fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a
(Footnote Continued)

denied "the most fundamental right of due process: a meaningful opportunity to be heard." Id. The Third Circuit noted that petitioners had failed to call as witnesses those officials who had "professional dealings or day-to-day contact" with Sourbeer and instead relied exclusively on parties who had only limited or indirect contact with respondent. 791 F.2d at 1102, Pet. p. 40a.[5] The court also noted that its own review of the record revealed that the periodic reviews "consistently misstated" respondent's sentencing status during isolation and that this "careless repeated error" was added support for the district court's finding that petitioners' conduct in continuing Sourbeer's isolation from month to month was unreasonable. Id.

While petitioners now claim that liability was found because petitioners did not conduct periodic reviews of Sourbeer's isolation, the record is abundantly clear that it was petitioners' unreasonable actions in confining Sourbeer from month to month in the absence of legitimate reasons for such confinement that formed the basis for the lower court's award of damages.

B. Respondent's Right to Be Free From Unreasonable Conduct Was Clearly Established in 1977.

Petitioners claim that the Third Circuit applied an improperly broad view of "clearly established right" when it denied immunity despite Sourbeer's failure to demonstrate that in 1977 case law clearly required that petitioners

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(Footnote Continued)
meaningful time and in a meaningful manner." Parratt, supra at 540.

[5]The evidence at trial introduced by respondent included records maintained by prison personnel assigned to the segregation unit. The records revealed that respondent exhibited consistently good behavior during the entire period of his confinement in segregation.

conduct such periodic reviews of segregated prisoners.[6] As noted above, this argument ignores the fact that both courts below identified petitioners' wrongful conduct as continuing Sourbeer's segregation from month to month when no reasons were present to justify such confinement. In applying Harlow, the task before the lower courts was to determine whether in 1977 due process required that petitioners have valid reasons in continuing to confine a prisoner in segregation. Based upon the law in the Third Circuit and decisions of this Court, the courts below properly held that in 1977 it was "clearly established" that a prisoner had a due process right to be free from the unreasonable acts of prison officials.

The issue of qualified immunity was thoroughly briefed by the parties and fully considered by the trial court in two pre-trial decisions. (App. 1a-9a, Pet. pp. 140a-152a). In applying Harlow, the trial court looked to the state of the law in 1977 with respect to a segregated prisoner's right to due process of law. Relying on three pre-1977

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[6]Petitioners' assertion that the Third Circuit's decision in People of Three Mile Island v. NRC, 747 F.2d 139 (3d Cir. 1984) "dilute[s]" the qualified immunity standard of Harlow is without merit. In People of Three Mile Island, in a decision joined by Justice Stewart, the court held the Nuclear Regulatory Commissioners were entitled to qualified immunity when they failed to grant appellant's request for a hearing on a Venting Order. Employing a common sense approach to the issue of whether governing case law would have given reasonable officials cause to know at the relevant time that their acts or omissions violated plaintiff's rights, the court held that while it would not insist on "precise factual correspondence between the conduct at issue and reported case law" neither would it "require governmental officials to predict the course of the law." Id. at 145, 148. In determining whether a right is clearly established, the Third Circuit demands "some but not precise factual correspondence" and requires that "officials apply general, well developed legal principles." Id. at 144. Such an approach, the court held, "strikes the balance between the competing interests" that this Court identified in Harlow.

decisions of the Third Circuit,[7] concerning Pennsylvania prisoners who had been placed in segregation, the court found that segregation and population were not interchangeable forms of confinement and that the decision to confine an inmate in segregation "trigger[ed] due process protections". (App. 8a). In denying petitioners' immunity, the court held that

> the clear import of the [Third Circuit cases] cited ... is that prison authorities may not act arbitrarily in transferring a prisoner from general prison population to segregation. This requirement of reasonable action ... was a requirement which we believe to have been clearly established at the time of plaintiff's transfer. (Emphasis supplied). (Pet. p. 148a).

In affirming the district court's decision denying petitioners' immunity, the Third Circuit examined its prior cases concerning prisoners in segregation and concluded that Sourbeer's right to due process was "clearly established within the meaning of Harlow ...." 791 F.2d at 1104, Pet. p. 51a. The Third Circuit rejected, as had the trial court, petitioners' attempt to distinguish the Gray, Tyrrell and Biagiarelli decisions on grounds that they did not apply to unsentenced inmates. The court noted that petitioners had failed to suggest any basis "for a reasonable officer to assume that an unsentenced inmate is entitled to less

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[7] Gray v. Creamer, 465 F.2d 179, 185 (3d Cir. 1972)(placement of prisoner in administrative confinement "without either notice of the charges or a hearing does not meet ... minimal due process requirements. This decision is consistent with a great number of federal court decisions indicating that the Fourteenth Amendment to the United States Constitution requires that certain safeguards accompany the imposition by state prison authorities of substantial punishment"); U.S. ex rel. Tyrrell v. Speaker, 471 F.2d 1197, 1203 (3d Cir. 1973)(decision to impose segregation must be "based on facts rationally determined...."); Biagiarelli v. Sielaff, 483 F.2d 508, 510 (3d Cir. 1973)(prisoner placed in administrative segregation "entitled to either written notice of the basis for his removal from the prison population and the opportunity to rebut the charge, or a hearing").

process than sentenced inmates...." 791 F.2d at 1103, Pet. p. 48a. Moreover, as the district court had noted, one of the Third Circuit opinions, United States ex rel. Tyrrell v. Speaker, supra involved, like the present case, an unsentenced prisoner who had been placed in segregation after being transferred to a state prison from a county jail. (Pet. p. 144a). The Third Circuit also failed to find persuasive petitioners' claim that the Gray, Tyrrell and Biagiarelli decisions were not controlling because they wrongly identified the Constitution and not the Pennsylvania regulation governing segregation as the source of a prisoner's liberty interest in general population. The court acknowledged that its earlier decisions suffered from a faulty rationale[8] in light of this Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983), but concluded that in 1977, petitioners "were on notice of Sourbeer's liberty interest and his concomitant right to due process." 791 F.2d at 1104, Pet. p. 50a.

For the first time in this Court, petitioners, borrowing from the dissenting opinion below, contend that the Third Circuit's reliance on the Gray, Tyrrell and Biagiarelli cases was misplaced as those decisions did not establish "standards to be used in reviewing inmates placed in segregation." (Pet. p. 23). As noted by the majority below, petitioners did not advance this argument on appeal nor did they raise the matter before the district court. 791 F.2d at 1104, n.8, Pet. p. 51a. As this Court has noted on many occasions, it is only in exceptional cases "that

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[8] ["A] reasonable official should not fail to respect a person's constitutional rights because the rationale behind the cases establishing those rights may be faulty." 791 F.2d at 1104, Pet. p. 51a.

questions not pressed or passed upon below are reviewed" in this Court. Duigan v. United States, 274 U.S. 195, 200 (1927). Nothing presented in the petition suggests that this is the exceptional case that justifies waiving this fundamental principle of review by this Court.

In rejecting the petitioners' qualified immunity claim, the Third Circuit faithfully adhered to the immunity standard set forth in Harlow. Identifying petitioners' liability-creating conduct as their unreasonable conduct in continuing Sourbeer's isolation from month to month in the absence of any reasons justifying such confinement, the court, relying on its own precedents, concluded that in 1977 reasonable prison officials would have known that segregative confinement "trigger[ed] due process rights" (Pet. p. 46a), the most fundamental of which is freedom from arbitrary action. Petitioners' claim that the law of "prisoner due process was in a state of flux" in 1977 (Pet. p. 24a), ignores the long line of decisions of this Court cited by the respondent in courts below holding that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government." Hurtado v. California, 110 U.S. 516; 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. (17 U.S.) 235, 244 (1819). In Wolff v. McDonnell, 418 U.S. 539 (1974), this Court's seminal prisoners' rights case, the Court held that "[p]risoners may claim the protection of the Due Process Clause" and that the "touchstone of due process is protection of the individual from arbitrary action of government, Dent v. West Virginia, 129 U.S. 114 (1889)." Id. at 556, 558. Because the issue of qualified immunity was decided in conformity with Harlow, and because the petition raises only questions turning exclusively on the facts of this case, certiorari should be denied.

II. THE COURTS ARE NOT IN CONFLICT WITH RESPECT TO THE "CLEARLY ESTABLISHED" REQUIREMENT OF HARLOW.

In an effort to attract this Court's attention, petitioners assert that the courts are in conflict with respect to the "clearly established" requirement of Harlow v. Fitzgerald, supra. (Pet. p. 28). This claim finds no support in the numerous qualified immunity decisions of the courts of appeals rendered since Harlow.[9] While courts have noted that the question of what constitutes a "clearly established" right was not resolved in Harlow, supra at 818 n.32, there is no open conflict, direct or in principle, between the circuits in determining whether constitutional rights are "clearly established." The absence of a square and irreconcilable conflict among the circuits on this issue is best evidenced by the fact that no court of appeals or district court has acknowledged that courts have adopted conflicting standards in determining whether rights are "clearly established."

Contrary to petitioners' claim, the Third Circuit in People of Three Mile Island, supra, did not find that the courts of appeals were in conflict in applying Harlow. In People of Three Mile Island, the court surveyed decisions from other courts and discussed what it viewed as the different "approach[es]" that courts have employed in determining whether a right is "clearly established." People of Three Mile Island, supra at 144. The Third

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[9] Petitioners' claim of conflict among the circuits is apparently based on a student law review article cited in People of Three Mile Island, supra, which claimed that some courts in applying Harlow had "demanded strict factual correspondence" between the case at hand and prior cases while other courts demanded "less factual correspondence...." Comment, Harlow v. Fitzgerald: Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983, 132 U.Pa.L.Rev. 901, 923 (1984).

Circuit's view that some courts require "strict factual identity" and others require officials to "relate established law to analogous factual settings" is not shared by other circuits as no other court has found that the circuits are applying either approach in deciding whether officials are entitled to qualified immunity. Id.[10] Significantly, in the decisions cited by petitioners as allegedly favoring one view over the other, the courts themselves make no reference to either approach in determining whether a right is "clearly established" within the meaning of Harlow. Because there is no real or intolerable conflict in principle among the circuits in determining qualified immunity for state officials, certiorari should be denied.

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[10] Certiorari was denied in a case from the Eleventh Circuit, a circuit which petitioners claim applies a broad view of "clearly established" right. Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982), cert. denied 464 U.S. 932 (1983).

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 28, 1986

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GREGORY S. SOURBEER, :
Plaintiff :
vs. : CIVIL ACTION NO. 79-0748
WILLIAM ROBINSON, et al. :
Defendants :

M E M O R A N D U M

The parties in this case have filed stipulations of undisputed facts, and cross motions for summary judgment. These motions are now ripe for disposition. Plaintiff, an inmate at the State Correctional Institution at Camp Hill has brought suit against various present and former officials of the Bureau of Correction. The cause of action is focused on a period of more than a year, from October 13, 1976 to October 27, 1977, during which plaintiff was confined in the Restricted Housing Unit (RHU) at SCI Camp Hill in administrative custody status.

Plaintiff was first transferred to Camp Hill from the Lancaster County Prison on October 13, 1976, following a conviction of first degree murder in Lancaster County Court.[1] Plaintiff was then fifteen years old. Upon arrival at Camp Hill and during the period in issue, plaintiff was an unsentenced prisoner and was therefore classified as an H.V.A. prisoner (hold for various authorities). (U.F. 12). While confined in administrative custody, plaintiff was denied entertainment and recreational privileges available to inmates in general population; required to eat all meals in his cell; permitted only one hour of exercise per day, Monday through Friday, outside of his cell; not permitted

[1]Plaintiff was transferred because the Lancaster County authorities viewed him as a security risk and felt that he could receive proper supervision at SCI Camp Hill (U.F. 10).

exercise on Saturdays and Sundays; denied regular visiting privileges available to inmates in population. Additionally, plaintiff was not permitted to go to the law library, was denied access to vocational training and regular educational programs available to other inmates, and was not permitted to attend religious services in the prison chapel. (U.F. 18-25). Plaintiff's status was reviewed about once a month, but he was continued in administrative custody until October 27, 1977, when he was finally sentenced on the murder conviction.

Plaintiff asks that the court enter declaratory summary judgment in his favor thereby deciding that defendants denied him due process of law in initially placing him in segregation, in failing to conduct meaningful periodic review of his confinement and in confining him in isolative segregation for more than twelve months without valid and compelling reasons. Plaintiff also contends that he was arbitrarily denied the right to freely practice his religion and that he is also entitled to summary judgment on this ground. Defendants argue, in support of their own motion and in opposition to plaintiff's, that plaintiff enjoyed no protectable interest in placement in the prison's general population, that the process accorded was adequate and that the lack of permission to attend congregational worship services did not violate plaintiff's rights, if extant, were not clearly established when administrative custody was imposed.

By letter of October 20, 1983, defendants have properly admitted that, based on the case of Drayton v. Robinson, ___ F.2d ___ (3d Cir., October 17, 1983), plaintiff did have a protectable liberty interest in being in the general prison population rather than in the RHU. The interest is defined in part by the two administrative

memoranda issued by the Bureau of Prisons relative to HVA cases. The first, in effect from March 17, 1975 to January 7, 1977 provides in pertinent part as follows:

> Although it may be desirable and necessary to segregate H.V.A. cases, there is no legal requirement to keep H.V.A. cases physically separated, when programmatic considerations warrant housing with sentenced inmates, this is permissible.... H.V.A. cases cannot be required to work or participate in programs. If the inmate requests work or program placement, he may be evaluated by the staff for such placement subject to certain guidelines. A). Work should be on a supervised detail. Regular institutional wage regulations apply. B). Short-term program placement is permissible where adequate supervision is available.

On January 7, 1977, the language just quoted was superseded by a second memorandum which provided in pertinent part that

> Generally H.V.A. cases shall be assigned to Administrative Custody. Exceptions are: 1) Medical cases requiring hospital or infirmary placement. 2) Disciplinary cases from the county or as a result of misconduct who require disciplinary custody. The institution shall determine the level of Administrative or Disciplinary Custody (close or maximum) based on the individual circumstances on a case by case basis.... H.V.A. cases are excluded from program participation and work assignments. They are limited to the routine activities of the Administrative Custody Unit.

Finally, on April 7, 1977, a further memorandum directed that prison officials accord a formal hearing when an H.V.A. case was received at an institution to determine the housing category in which the individual would be placed. Although it could be argued that the H.V.A. memoranda contain no mandatory, substantive standards applicable to the decision to place in administrative segregation, the court in Drayton found that these memoranda were to be read in pari materia with Administrative Directive 801 which does contain specific criteria and procedures.

Having determined that plaintiff enjoyed a protectable liberty interest, we determine whether that interest was infringed by his confinement in the R.H.U. As

is pointed out in the briefs, there are two facets to this analysis: -one procedural and one substantive. We first apply the procedural requirements to the facts of this case. In Drayton, the court noted that due process does not necessarily require that the procedures detailed in the administrative directive be strictly followed. Slip. op. at 10. Rather, the relevant guidelines for our purposes are set out by the Court in Hewitt v. Helms, ___ U.S. ___, 103 S.Ct. ___, 74 L.Ed.2d 675 (1983):

> We think an informal, nonadversary evidentiary review [is] sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decision maker reviews the charges and then available evidence against the prisoner, the Due Process Clause is satisfied. This informal procedure permits a reasonably accurate assessment of probable cause to believe that misconduct occurred, and the "value [of additional 'formalities and safeguards'] would be too slight to justify holding, as a matter of constitutional principle" that they must be adopted. Gerstein v. Pugh, supra, 470 U.S., at 122.

Id. at ___, 74 L.Ed.2d at 691. The Court also recognized the necessity of periodic review:

> Of course, administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review, of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence or statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner -- which will have been ascertained when determining to confine the inmate to administrative segregation -- and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for "proof" in any highly structured manner.

74 L.Ed.2d at 692, n.9. We realize that Hewitt is not on the facts identical to the case before us, which does not involve a specific charge of misconduct, but we believe the guidelines defined by the Court can easily and appropriately be applied to this case.[2]

Applying the relevant criteria, we must reluctantly conclude that material factual issues exist which prevent us from entering summary judgment in favor of any of the parties. We are unable to come to any definite or satisfactory resolution with respect either to the procedural or substantive claims. Procedurally, Hewitt requires an initial, informal review of a prisoner's case before he is committed to administrative custody. The Court also requires that the prisoner be afforded some notice and an opportunity to be heard. Although these latter requirements may be less useful in a case, as the present one, where no specific incident of misconduct forms the basis for the confinement, we think Hewitt requires and it is not unreasonable to expect that the inmate initially be given an opportunity to present his views. Further, Hewitt requires periodic review of an administratively confined inmate's case on an individual basis to justify further confinement.

In the present case, although it does not appear that plaintiff was given notice or any opportunity to be heard when he was initially received into administrative

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[2]We acknowledge there is some authority to suggest that, where there is no specific charge of misconduct, the procedural safeguards to an assignment of administrative custody must be even more strict, See U.S. ex rel. Hess v. Cuyler, 452 F.Supp. 256 (E.D. Pa. 1978). This case pre dates Hewitt, however, and, absent controlling authority to the contrary, we deem it prudent to apply the standards expressed in Hewitt to the case before us.

custody at SCI Camp Hill, he was interviewed relative thereto approximately one month later, on November 17, 1976. (U.F. 44, 45). Thereafter, the plaintiff was seen by the P.R.C. and his case reviewed once a month until his eventual release from the RHU. In every case, of course, the decision of the P.R.C. was to continue plaintiff in administrative custody.

Plaintiff complains that the monthly reviews were not "meaningful" as mandated by Hewitt because they amounted to no more than a wooden application of a general policy to detain HVA inmates in administrative custody rather than a proper focusing on plaintiff's individual needs. Defendants argue that this argument blurs the distinction between procedural and substantive due process. Certainly, it is true that the procedural and substantive issues intersect in the phrase "meaningful review." That is, plaintiff appears to argue that the review accorded his case was procedurally defective because it did not include consideration of those individual factors which would lead a reasonable person to conclude that further confinement in the RHU would serve no legitimate and useful purpose. Thus, the alleged procedural defect led to arbitrary confinement and, hence, a substantive violation.

At this point, we encounter difficulties. We agree with plaintiff that Hewitt requires that periodic review hearings focus on facts relating to a particular prisoner. In this regard, we note that it has been stipulated that plaintiff was not given, during his confinement in administrative custody, a complete psychological and psychiatric examination. (U.F. 76). We also note that plaintiff was never charged with a major or minor misconduct. (U.F. 72). We are informed that "[o]ther factors considered by the P.R.C. in plaintiff's case were

his sentence status and his age." (U.F. 73). The P.R.C. decisions are cursory and cryptic. Some appear to reflect a concern for plaintiff's needs for supervision and special programming (U.F. 46, 51, 52, 54, 55); others tersely express concerns rooted in plaintiff's age (16) and, perhaps concomitant, security risk (N.T. 47, 50); still others suggest that plaintiff's H.V.A. status was the only relevant factor considered by the P.R.C. in concluding that plaintiff should be continued in the RHU. (N.T. 48, 53). We believe Hewitt requires that the P.R.C. consider more than H.V.A. status in reviewing plaintiff's case, but we are unable to determine here on the record before us whether or not it has really done so.

Substantively, plaintiff argues that the decision to confine him in the RHU was arbitrarily and unreasonably based solely on his H.V.A. status. Again, we are presented with a diverse collection of undisputed facts. Plaintiff was never cited for misconduct (U.F. 72) and had never been given a complete psychological and psychiatric examination (U.F. 76). Plaintiff was released into the general population shortly after being sentenced by the Lancaster County Court (U.F. 74). It is admitted by defendants that there were a number of juveniles at SCI Camp Hill, apparently in the general population.[3] What are we to make of these facts? On the one hand, the monthly review reports suggest that individual factors of programming and security were considered by the P.R.C. On the other hand there is evidence to suggest that defendants kept plaintiff in the

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[3]Apparently, there is some dispute as to the number of juveniles incarcerated in Camp Hill. The juvenile population was being phased out of Camp Hill to juvenile detention centers from 1975-77.

RHU because of his H.V.A. status and that his status was the only determinative facts considered by the P.R.C. at the periodic reviews. However, to so conclude at this time, would be to draw inferences from the facts which we may not do summarily. We feel that a resolution of these issues requires a fuller factual development of the reasons for plaintiff's continued administrative confinement. Because the merits of plaintiff's claim regarding denial of his right to practice his religion hinges on the legitimacy of his confinement in RHU, we may not resolve this issue at present.

We briefly consider the final basis on which defendants claim entitlement to summary judgment. Defendants argue that they are entitled to qualified good faith immunity pursuant to Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) because, whatever rights this court may not find the plaintiff to have had, such rights were not "clearly established" at the time defendants acted to administratively confine him. Plaintiff has cited several appellate cases from this circuit which predate plaintiff's confinement and which suggest that administrative custody does trigger due process protections. See Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197 (3d Cir. 1973); Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1973). Apparently, prison authorities understood the law at the time of plaintiff's confinement to require due process hearings, as evidenced by the April 7, 1977, memorandum to prison superintendents from Commissioner Robinson regarding H.V.A. cases. In the letter attached as exhibit B to plaintiff's supplemental brief Commissioner Robinson refers to "court rulings" which require formal hearings to determine housing categories. Although the law in 1976-77

may have not crystallized in precisely the manner later expressed in Hewitt, similar protections were required. Under these circumstances, we cannot find that a right giving rise to due process was not clearly established at the time of defendants' actions here, and so cannot give the defendants the benefit of qualified good faith immunity as defined in Harlow.

An appropriate order will be entered.

/s/
William W. Caldwell
United States District Judge

Date: April 2, 1984